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Mr. Gary Flamm
gflamm@energy.state.ca.us
Project Manager
California Energy Commission
1516 9th St., MS 26
Sacramento, CA 95814
916/654-2817

Dear Mr. Flamm:

The California Sign Association and Sign Users Council of California, in conjunction with the International Sign Association, have undertaken a serious and detailed analysis of the CEC's draft proposals to regulate lighting standards for signage. While we applaud and support efforts to promote energy conservation, we are deeply concerned that the current effort far exceeds the mandate, both in spirit and intent, of Senate Bill 5x. Moreover, the proposals reach beyond the Legislative Intent by seeking to establish a significant unlawful expansion of the CEC's role in the regulation of zoning. In so doing, the proposals pose a significant unfair and unreasonable burden on property and speech rights, and will cause adverse economic effects on business throughout California.

The sign industry is itself mindful of energy conservation (in fact, the market demands that energy saving technology be used). However, while we look forward to further discussion with you regarding our concerns regarding the proposals with the CEC, no meaningful or fruitful discourse can occur if anything other than energy conservation is on the table.

**Analysis of the California Energy Commission Proposals**
Proposals have been submitted to include on-premise business signs in the energy restrictions being developed under Senate Bill 5X (Senate First Extra Session - Bill No. 5, Statutes of 2001) which were authored by Senator Byron Sher. This bill established authority in Public Resources Code, Section 25402.5 (3) (c ) for the California Energy Commission to adopt lighting standards for outdoor lighting.

That bill states in pertinent part:

"SECTION 1. The Legislature finds and declares as follows:
(a) California is currently experiencing an energy crisis which threatens to adversely affect the economic and environmental well-being of the state.
(b) One of the most cost-effective, efficient, and environmentally beneficial methods of meeting the state's energy needs is to encourage the **efficient use of energy.**
(c) The **purpose of this act** is to ensure the immediate implementation of **energy efficiency programs in order to reduce consumption of energy** and to assist in reducing the costs associated with energy demand.
(d) To the maximum extent feasible, the expenditure of funds appropriated pursuant to this act shall be prioritized based upon immediate benefits in **peak energy demand reduction and more efficient use of energy**."

The Commission's scope and authority is contained within the California Public Resource Code section 25402 as follows:

"25402. The commission shall, after one or more public hearings, do all of the following, in order to reduce the wasteful, uneconomic, inefficient, or unnecessary consumption of energy:

Prescribe, by regulation, lighting, insulation climate control system, and other building design and construction standards which increase the efficiency in the use of energy for new **residential and new nonresidential buildings**.

With the passage of Senate Bill 5X,

"SEC. 4. Section 25402.5 of the Public Resources Code is amended to read:

25402.5. (a) As used in this section, ''lighting device'' includes, but is not limited to, a lamp, luminaire, light fixture, lighting control, ballast, or any component of those devices.

(b) (1) The commission shall consider both new and replacement, and both interior and exterior, lighting devices as lighting which is subject to subdivision (a) of Section 25402.

(2) The commission shall include both indoor and outdoor lighting devices as appliances to be considered in prescribing standards pursuant to paragraph (1) of subdivision (c) of Section 25402.

(3) The Legislature hereby finds and declares that paragraphs (1) and (2) are declarative of existing law.

(c) The commission shall adopt efficiency standards for outdoor lighting. The standards shall be technologically feasible and cost-effective. As used in this subdivision, ''outdoor lighting'' refers to all electrical lighting that is not subject to standards adopted pursuant to Section 25402, and includes, but is not limited to, street lights, traffic lights, parking lot lighting, and billboard lighting . . ."

**On-premise business signs are not included in these requirements.** Their purpose is commercial speech. They are not a "lighting device." **Nor are they "outdoor lighting."** Outdoor lighting is lighting intended to illuminate broad areas of undefined space e.g., traffic lights, parking lot lights, etc. The internal illumination required for on-premise business signs is intended to illuminate the sign message within the display structure.

So, why is this happening?

To determine the basis for this attempted modification of the legislative intent, it is illuminating to read the CEC summary presented on February 2, 2002. No discussion occurs by the staff and consultants regarding energy conservation, the levels of energy consumption from outdoor lighting, what energy production might be saved by restrictions on such lighting and the research and analysis that might be required to accomplish the purposes of the Bill. Instead, their introductory document, "California Outdoor Lighting Standards Synopsis," immediately focuses on agenda items not included in the Bill -- "Light Trespass" and "Light Pollution"-- and redirects the Commission's efforts towards accomplishment of those items with only cursory reference given to the Senate Bill's requirements.

Throughout this document there is discussion of these "dark sky" agenda items that have no substantiated relationship to energy conservation. The International Dark-Sky Association is a group of professional astronomers, many of whom are federal employees, amateur astronomers, lighting engineers and others. The original purpose of this group was to reduce radiating light, light which either directly or indirectly transmitted towards the sky and affected the performance of their observatories. Recent analysis of the groups writings and actions lead to the conclusion that this group of 8,800 people is now attempting to change our society's culture regarding the use of night-time illumination at any location in our country. They are promoting a new social policy agenda through the crafty usage of words to affect people's belief that somehow light equates with pollution.

Further insight is gained by studying the transcript of the March 27, 2002 California Energy Commission Workshop on Outdoor Lighting Standards Ideas. The lead consultant, Eley, states:

"Outdoor lighting is a big contributor to the electricity problem in California. It contributes to both the electricity consumption and to the peak. And it's also highly related to a number of other social and environmental impacts, such as light trespass and light pollution. Light trespass and light pollution have been identified in the Advanced Lighting Guidelines, which is available from NewBuildings.org. This was a project funded by the California Energy Commission and others."

Some of the same consultants are involved in this which up until now primarily addressed the buildings. The question should be explored concerning whether these people are simultaneously introducing their social agenda and referencing their work in a circular manner between the two projects.

Within this transcript there is no technical discussion or presentation of data to substantiate the assertion that outdoor lighting is a big contributor to the electrical problem in California. They ignore section 1 of the bill.

On page 207 of March 27 transcript, Consultant Herschong states:

"All right. We have a much smaller group for probably one of the more controversial issues. That always helps.

"There is a proposal on the table, as part of this process, to see if there is an appropriate way to regulate some of the lighting that's used for billboards and outdoor signage."

Note that the consultant immediately lumps business signs with billboards, which are required to be regulated. The "proposal on the table" references Eley when he states on page 10 and 11:

"The last four topics are new ground. One of them is lighting under exterior canopies. The best example of this is service station canopies, but there are other examples as well of point-of-use canopies, point-of-sale canopies.

"Another area which we are proposing to develop a standard for is outdoor sales lighting. This would include car lots, garden centers, and any other type of outdoor sales area space. So that, down through outdoor sales lighting, we expect that we can include all of these standards in Title 24, in Part Six of Title 24. They would be -- The trigger for the regulation would be the application of the building permit, application for a building permit, just like all the other Title 24 standards.

"There are two other topics that we're researching. They're the last two on the list here. One of them is billboard and outdoor signage. And then finally, public right of way lighting. Public right of way lighting would include -- I mean, here what we would -- the decisions made about public right of way lighting are typically made by the public works departments in cities and counties, they're by CALTRANS and by public agencies. And it's not clear to us that building permits are needed to erect a sign either.

"So these last two we don't really see at this point being implemented as part of Title 24, but what we're suggesting to do here is to develop a standard for billboards and public right of way lighting that we would -- and we would promote the use of this standard with cities and counties and with CALTRANS. **So it's not clear that we can regulate those standards through the building permit process.**

"So that's an introduction to the project as a whole. I think we've got a terrific team involved here. Jim Benya and Nancy Clanton and Lisa Heschong and Larry Ayers are doing most of the research. Roger Wright's role on this project will be to help us assess the impact of this project once the standards begin to take a little more form." These are all contained within the consultants March 18, 2002 "Measure Identification Report".

Consultant Herschong continues:

"This is one of our more difficult tasks, because it really is cutting new territory. Billboard and signage energy use lighting regulation has generally not been included in any of the other codes, state or local codes that have addressed outdoor lighting.

"I should say that, however, last year under the governor's emergency provisions, billboard and outdoor signage lighting was included. So we do have precedents within California from last year's emergency regulations.

She misquotes the Governor's Executive Order in order to justify their proposal. That order states:

"EXECUTIVE ORDER D-19-01, by the Governor of the State of California.

WHEREAS, on January 17, 2001, I proclaimed a State of Emergency to exist due to the energy shortage in the State of California; and

WHEREAS, efforts by California residents to conserve energy are essential to alleviating the energy shortage; and

WHEREAS, substantial amounts of electricity are consumed through unnecessary outdoor lighting by retail establishments after business hours, including but not limited to, shopping centers, auto malls and dealerships; and

WHEREAS, it is imperative that unnecessary consumption of electricity be eliminated to mitigate the effects of this emergency; and

WHEREAS, the energy shortage is a matter of public safety;

NOW, THEREFORE, I, GRAY DAVIS, Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and the statutes of the State of California, including the California Emergency Services Act, and in furtherance of my Proclamation of a State of Emergency, do hereby issue this order:

All California retail establishments, including but not limited to shopping centers, auto malls and dealerships, shall substantially reduce maximum outdoor lighting capability during non-business hours, except as necessary for the health and safety of the public, employees, or property. "Maximum outdoor lighting capability" means the total amount of wattage used in outdoor lighting **to illuminate the outdoor premises of the retail establishment."**

The Executive Order contains no direct or indirect reference to on-premise business signs. Furthermore, it only discusses area illumination when the businesses are not open.

The consultant continues:

"The proposal that's currently on the table is to look at a lighting power density for billboards and signage. The challenge there is to define the area. That may be a lot easier with a billboard than with a sign, which can have all kinds of shapes and areas and be three-dimensional. And so a lot of the challenge there is in coming up with the proper definition of the area that is being controlled at a certain lighting level.

"The intention is to cover all permanently installed outdoor signs and billboards; however, not to cover temporary signage or public directional street right-of-way-type

signage. So the effort is primarily at signage used for communicating other things besides how to find your way through a city.

"Again, the proposal is that the various conditions will most likely have some variance by the lighting zones, and the greater impact there may be with controls, control requirements or definitions. The lighting power density will be pursued through a similar type of process using the ETAL method in terms of visibility and discrimination.

"One of -- There are a number of objectives, I think, that the team is trying to pursue. The first and primary is to save electricity and demand, very straightforward and simple. To avoid wastage light, to avoid excessive use of illumination that is wasteful. Secondarily, there is a great deal of concern about billboards and signs as a source of glare, and which could push people's adaptation level to a higher level, and therefore require higher levels of illumination on adjacent properties. And so there is a secondary issue of how to structure a set of regulations that will somehow reduce the potential for glare or extremely high levels of luminance from these signs, which may push people up to a further adaptation level.

"With outdoor billboards and signage, if the outdoor billboard or sign is required to get an electrical permit for work being done, there is a fairly straightforward process of putting those requirements through the building permit process which follows the Title 24 procedure. However, with billboards and signs, there is also a great deal of precedence in California for local districts regulating signs as part of their design conditions or zoning conditions for their areas. And so we will also be looking at the potential for creating a model standard that would be adoptable through that procedure through local jurisdictions, as opposed to through the Title 24 permitting process.

"Now, another challenge with signage and billboard is extraneous light, light which is escaping beyond useful illumination. For a lot of billboards, this is light that is escaping up into the sky or onto adjacent properties and that is not being used to usefully illuminate the surface of the sign, if it's an exterior-illuminated sign. Those concerns about wasted light, about intrusive light then start to argue for some form of cutoff control or control of the illuminance. It doesn't all necessarily have to be done as an equipment description, it can also be done through the design of the sign itself and how the light is distributed on the sign."

**<u>This consultant is presenting the Dark Sky agenda.</u>**

It is interesting to note aircraft pilots readily observe that the major source of radiating light is area lighting from streets and parking lots, yet in the discussion about signs, Gary Fernstrom, the PG&E engineer states on page 232:

"So speaking on behalf of the utilities, I'd like to express concern that whatever standard is developed not create a huge financial impact, in terms of a potential retrofit requirement. Because the utilities are probably the largest owner of streetlights in the state, and own tens of thousands if not hundreds of thousands of them."

It has been determined that two of the consultants, Benya and Clanton, are members of the board of directors of International Dark-Sky Association. See www.darksky.org.

Continuing with the presentation on March 27, Mr. Fernstrom discusses his ideas regarding the regulation of business signs. The written public comments include technically flawed proposals by Gary Fernstrom, Senior Project Manager, Pacific Gas and Electric Company, dated March 25, 2002 promoting the regulation of business signs. On page 225 it is apparent that the commission is not aware of the industry trade associations, or the differences between off-premise and on-premise signage. Also contained within the proposals are recommendations to establish overlay zoning districts, what they term "environmental zones". Heschong states on page 14:

"The proposed environmental zones would define four levels of illumination criteria that basically become geographic territories. And the concept is that there are different environmental sensitivities. Although lighting is provided for human uses, there are other environmental uses, there are other species that are affected by light. And they should be considered in relationship to outdoor lighting criteria. And also, that there are different levels of needs for outdoor lighting that are primarily territorial. So these four zones, I'll talk about the first one. The first one, which is referred to as E1, is talked about as a territory of intrinsically dark landscapes. We have not nor have any of these international illumination agencies gotten to the point of specifically defining these zones. So at this point they are talked about rather generally. Intrinsically dark landscapes are places where you would go out at night and be able to see the stars, see the Milky Way, and where there is the most need to protect the environment from light trespass and light pollution for various reasons, or simply for the aesthetic appreciation of the sky at night in its natural condition.

"In pursuing this concept of environmental zones, our research will be looking at understanding legal definitions within the state of California that define specific territories, geographic areas that may have a relationship to environmental zone. And where there is a state interest in protecting an intrinsically dark landscape at night."

<u>This is not research of a concept. It is using public funds to determine whether or not they can legally accomplish their agenda</u>.

Continuing:

"The proposed E2 would be areas of low ambient brightness. They don't need extreme protection for completely dark nights, but they're areas where there is reasonable reason to pursue low ambient brightness. And this would basically become a simpler minimal standard for outdoor illumination at night.

"Moving on to zone three, E3 is talked about as an area of medium ambient brightness, and then logically you would follow that E4, the highest level, are areas of the highest level of ambient brightness.

"Now, it's important to understand that these zones being geographical areas are not tied to building uses. It doesn't necessarily mean residential versus commercial or

industrial. You very easily can have a commercial or an industrial use which might occur in an E2 or an E3 area.

"Thus there is may be no relationship between their concept, energy savings or legally valid land uses."

Again she states:

"And part of our task in defining these will be to understand how they can be defined legally geographically, how to create a system that will be flexible and responsive to development needs, and that will respond to changing perceptions of whether a specific area should be considered an intrinsically dark area or an area of very high ambient illumination. These environmental zones are being conceived as being tied to at least two and maybe three of the criteria that will be developed for the specific applications. One of these criteria is time of use, and is being talked about generically as a curfew period.

"A second period would be what is being called a curfew period, which would have the most stringent requirements. ...This would be the time of the night when there is the least human activity.

"How it gets defined may become a statewide level or it may be pushed down to the local level. You could have a local definition of curfew. Various definitions that have been proposed have been an hour after business closing time, 11:00 o'clock at night, midnight, so many hours after sunset.

"And so this may be a variable period, from dusk, sunset, when we begin to turn on outdoor lights, to when curfew starts at night, and then again, in that period, in-between period in the early morning hours between the end of curfew and when there is sufficient light after dawn that we can start to turn off outdoor lighting applications. So right now what we're looking at is a definition of these three time periods, and each set of applications would tie a set of requirements for these three, maybe four time periods, by environmental zone, so that requirements for curfew could vary by environmental zone and vary by application."

**Thus proposing that the California Energy Commission begin regulating the acceptable times for human activity.**

It is important to note that these proposals are from the Dark-Sky group. **The proposals are not related to energy conservation, but rather to the special interest agenda of that group.** They existed prior to the California Energy Commission's efforts, first having appeared in ordinances written in Tucson and Flagstaff Arizona in the 1990's. There was objection to these proposals, which were ignored by the consultants and the commission. For example on page 46 an individual from the Sacramento County Building Department states:

"Just listening to this, I find it very disturbing that the Senate can pass a bill to -- that the motive of that bill is to conserve energy. And it's obvious that if you turn off lights, you save energy; if you don't install lights, you save energy. That's obvious. But all of a sudden, we've turned that bill to save energy into an environmental agenda program to where the environment has nothing to do with building use or outdoor lighting in a parking lot or something else like that. But we want to now turn this Senate bill which said save energy into creating four distinct mandated environmental zones. That's not what the bill was about.

"That's not what the bill addressed. And it's totally improper and wrong, and it's misdirected. Environmental has nothing to do with the light usage that the bill had in mind for saving energy, absolutely nothing."

On June 6, 2002 the consultants lead by Eley Associates presented their proposed standards. This proposal includes the recommendation of overlay zoning districts. It includes many detailed lighting standards based on the type of activity being regulated. "Measure 8" contains their proposed regulations of Outdoor Signs and Billboards:

"This measure would set maximum allowed power, minimum efficacy and control requirements for outdoor signs used for other than traffic regulation or emergency purposes."

They do not address indoor signs, even though interior signs use the same technology, frequently with the same light output and energy consumption. The "research method" used to establish the recommendations was as follows:

"The approach used to develop the standards for billboards and signs is different from the approach taken for other outdoor lighting measures. The approach for signs is to survey manufacturers recommendations for sign illumination. The criteria for LZ4 is set to the highest lighting level recommended by any of the manufacturers.

The criteria for LZ3 is set at the 75th percentile of the range of lighting power. The criteria for LZ2 is set to 50% of the LZ3 level. Power for signs in LZ1 are limited to less than 20 W per face.

The following bullets describe the research that is conducted to determine lighting power ranges for signs:

- Manufacturer's web sites are reviewed for current recommendations of source wattage relative to sign types and sizes. The web sites included Holophane, Wagner Electric, Adaptive, Electric Brite, Neon Central, and Acuity Brands.
- Association web sites were reviewed, including California Electric Sign Association, Outdoor Advertising Association of America, International Dark Sky Association, and Sign Web.

• The current Illuminating Engineering Society of North America (IESNA) Handbook, Ninth edition, discusses several objectives and methods for lighting signs.

• IESNA RP-19-01 includes a discussion of visual performance recommendations and pros and cons of various illuminated sign approaches.

• Building department personnel were interviewed relative to current regulatory practices affecting outdoor illuminated signs and the enforceability of various regulatory approaches.

• Other codes that regulate outdoor illuminated signs were reviewed, in particular El Monte, CA; and Flagstaff, Tucson, and Pima County, AZ.

There are approximately 30,000 companies engaged in the sign business, yet they only looked at the sales oriented web sites of Wagner Electric Sign Company, a local company in Ohio, Neon Central, a division of Everbrite that manufacturers and sells portable, interior signs, and "Electric Brite", an unidentified company that Google's search engine couldn't find. Holophane, Adaptive and Acuity are not sign companies.

They did not contact the California Sign Association (CSA), which has a Technical Advisory Committee. They did not contact the International Sign Association, the organization that represents the sign industry nationally on technical committees and panels, such as the National Electric Code.

The references to International Dark Sky Association and IESNA are mostly references to the consultants' own prior or concurrent work. The "other codes" represent prior efforts by the International Dark Sky Association.

They reference IESNA publications, but the ASHRAE/IESNA Standard 90.1-1989 specifically exempts the following:

Sign Lights. Both self-contained and external illumination for signs are exempt. Exterior Lighting. Outdoor lighting for a wide variety of special situations is exempt, including:

· Outdoor Manufacturing, Commercial Greenhouses and Processing Facilities. This in general is meant to exempt outdoor commercial, agricultural and industrial work areas, ranging from nighttime farming activities to refineries.
· Outdoor Athletic Facilities. Lighting for outdoor sports of all kinds is exempt.
· Exterior Lighting for Public Monuments
· Lighting for Dwelling Units. Note that exterior lighting as well as interior lighting for dwelling units is exempt.

No analysis was conducted regarding the legality of regulating commercial speech as they propose. Their proposals include content control provisions subject to strict judicial scrutiny, such as the requirement for dark backgrounds, as well as effectively total censorship, for example the limit of 20 watts per face for signs in zone 1.

The provisions regarding on-premise signs are technically flawed. The information presented regarding LEDs and neon is inaccurate. This proposal would cause the destruction of a energy efficient lighting industry, cold-cathode lighting, a highly flexible form of electric discharge lighting. Generically, this is often referred to as neon lighting. 25 mm cold-cathode lighting is an efficient competitor with mass produced T8 fluorescent lamps. That is particularly ironic as other lighting manufacturers are busy attempting to perfect T5 lamps, the 15mm diameter "neon" tubing that the sign industry has used for decades.

The proposal continues the Dark-Sky agenda with little, if any, relationship to energy savings.

At no time during this process have the consultants addressed energy production and whether any specific regulations they proposed will result in a reduction in energy production, peak-load requirements and system wide energy consumption as required by the Senate Bill. They have failed to conduct a cost analysis as required by the Senate Bill. Their sole focus is night-time light emittance.

They ignore the real economic costs to purchase expensive unproven technology, the real costs in lost productivity, the real costs of reductions in the states retail economy and the public safety issues resulting from insufficient illumination.

**On-Premise Signs Are Protected By the First Amendment**

In drafting the California Outdoor Light Standards for the California Energy Commission regarding on-premise signs, the CEC's paid consultants overlooked a simple but very important legal concept: signs are a form of protected speech.

On-premise business signs are designed to communicate a commercial message. The purpose of a lighted sign is not to illuminate the outdoor environment at night; rather, it is to illuminate a commercial message for dissemination to the public. While the definition of "lighting device" contained within Section 25402.5 of Senate Bill 5X broadly defines "lighting device" to include components commonly used in the construction of lighted on-premise signs, and the definition of "outdoor lighting" is similarly broad, the communicative aspect of signage must be addressed in any proposed regulation of on-premise signs because of the First Amendment rights that are impacted by any regulations seeking to control either the content of messages displayed on signs or seeking to regulate the time, place, or manner of a message's display.

**The California Outdoor Lighting Proposals Impermissibly Regulate the Content of Protected Speech.**

First Amendment doctrine dictates that when a government regulation restricts speech, the first step in a court's analysis is "to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the

proper level of scrutiny." *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (O'Connor, concurring). Regulation of speech is content based when the content conveyed determines whether the speech is subject to restriction. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993).

At their outset, the proposals offered by the CEC's paid consultants on June 6, 2002, establish content-based distinctions between lighting standards for various activities that involve communication and communicative activities. Page 1 of the "Outdoor Lighting Research" report prepared by Eley Associates proclaims their intention to regulate lighting for "Outdoor sales, Billboards and outdoor signage" while exempting from those regulations such items as "sports lighting, illumination of public monuments, lighting for ATMs, decorative gas lighting, lighting for theatrical purposes..., and exit signs."

These distinctions leave many possible aspects of communication, concerning both commercial and noncommercial speech, exempt from the proposed lighting regulations due entirely to their content. For example: "Sports lighting" may include the on-premise signs and displays of sports fields, both amateur and professional, as well as the lights used for playing the particular sport; "illumination of public monuments" may result in a preference for the display of certain statutes, figures or ideas to the exclusion of other displays, perhaps of a political or religious nature; "lighting for ATMs", while apparently acknowledging a need for some consideration of public safety at night, may also serve to promote an individual industry, company or service; "decorative gas lighting" is exempted as a category but may still compose a signature theme of identity for given businesses or business districts, thus favoring those businesses in a competitive nighttime environment; and "lighting for theatrical purposes" appears broad enough to exempt the advertising and lighted on-premise identification for any entity laying claim to a myriad of possible, albeit undefined, "theatrical purposes."

Once made, little else is offered by the consultants in way of justification for these use or content distinctions, and the consultants utterly failed to make any attempt to define the permissible uses of lighting for the exempted categories of activities and speech, or to analyze the potential impact on protected commercial and noncommercial speech of their proposed lighting restrictions. In making these unsupportable use classifications, the proposals offered by Eley Associates explicitly create content-based restrictions upon the nighttime communication and display of communicative information – speech – that is available to the public.

Moreover, the Eley Associate's proposals (and thus the CEC's proposals) implicitly create overbroad content-based distinctions that unduly restrict the dissemination of speech. While "billboards and outdoor signs" may imply billboards and on-premise signs that are used to convey commercial messages, many other uses for billboards and illuminated signs to convey noncommercial information would also fall under the proposed regulations. The United States Supreme Court has noted these many forms of expression and speech that are made through signage. See *Metromedia, Inc. v.*

*San Diego*, 453 U.S. 490, at p 502 (1981). Beyond business identification, lighted signage and billboards are common and extremely cost-effective platforms used to display political messages, news and community service information, religious messages and identification, artistic expression, and other forms of fully protected noncommercial speech.

The United States Supreme Court has delineated two standards for addressing content-based regulations of speech; the standard to be applied is determined by the level of First Amendment protection afforded the type of speech implicated, commercial or noncommercial. Under the proposed outdoor lighting standards promulgated by the CEC, both analyses are necessary for the CEC's consideration as the proposals will negatively impact and restrict both commercial and noncommercial speech if adopted, and thereby expose the CEC to civil rights litigation from a multitude of potential litigants. Any potential plaintiff claiming an abridgment of their First Amendment rights may challenge these regulations, if adopted, as content-based restrictions on speech, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), or because the regulations may have a chilling effect not only their own speech, but also the speech of others not present in the litigation. *Virginia v. American Booksellers Association*, 484 U.S. 383 (1988).

**First Amendment protection of <u>noncommercial</u> speech.**

The first standard of review, strict scrutiny, is applied by the courts to content-based regulations that restrict protected noncommercial speech. Under this level of review, the government must show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that interest." *Boos v. Barry*, 485 U.S. 312, 321-322 (1988). Further, the disputed regulation must be narrowly drawn *by the least restrictive means* to accomplish the compelling interest asserted. *Boos*, at 329. (emphasis added).

Under the current proposals by Eley Associates, the CEC may find difficulty in establishing a sufficiently compelling government interest to justify such regulations when challenged in court. The opening two pages of the "Outdoor Light Research Report" by Eley Associates makes clear their intent to use the goal of "energy conservation" to promote a secondary public policy agenda that (1) is not supported, contemplated, or even mentioned by Senate Bill 5x or in Governor Davis' Executive Order D-19-01; (2) consists of a private special-interest agenda, namely that of the International Dark Skies Association, and which usurps the issue of "energy conservation" to promote that organization's private concerns about such alleged problems as "light trespass" and "light pollution"; and (3) issues proposals crafted to address non-statutory topics, such as "light trespass" and "light pollution," without offering any evidence, data or credible research to support their bare assertions that addressing these issues will result in actual energy savings or result in a reduction of peak energy demand, as required by Senate Bill 5x. The consultants' proposals have offered nothing more than a speculative approach to achieving the goal of "energy conservation" through a regulatory approach drafted to primarily address a special interest group's bare

assertions that "light trespass" and "light pollution" are problems contributing to the energy crisis in California.

Conversely, no evidence or credible research has been presented to show that addressing this Dark Skies' agenda will in fact lead to energy conservation or to a reduction in peak energy demand. In short, while "energy conservation" is a government interest that may well be viewed as "compelling," the proposals put forth by the CEC's consultants are considerably less than "compelling," and may not be viewed by a court upon review as even constituting a "government interest."

Assuming that the CEC's asserted government interest is found sufficiently compelling and that the proposed regulations satisfied the legislative intent to conserve energy, the regulations are still subject to constitutional attack for unduly restricting the exercise of First Amendment rights. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Boards*, 502 U.S. 105 (1991). To pass constitutional muster, a government regulation of protected noncommercial speech must pass the second prong of strict scrutiny review - that the regulations be narrowly tailored, by the least restrictive means, to accomplish the stated government interest. *Boos*, at 329.

In establishing a statewide overlay of "lighting zones" that limit a sign's illumination arbitrarily based upon population statistics, the CEC would be severely limiting the rights of all speakers to engage in noncommercial and commercial speech through signage at night. A speakers right to display his or message at night, and to have that message be seen, would be severely curtailed, without any evidence, data or research offered by the CEC consultants to even attempt to demonstrate what constitutes adequate lighting requirements for a particular sign or message to maintain the sign's legibility or conspicuity. Since signs that cannot be read are the equivalent of speech that cannot be heard, lighting zones that broadly foreclose mediums of expression with overbroad regulation of all categories of speech will very likely be found insufficiently narrowly tailored to meet constitutional scrutiny. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

Also, through a requirement for reverse-contrasting of letters and designs on signs, the outdoor lighting proposals put forth sweeping requirements that affect not only how a message may be displayed at night, but also affect the content of those messages. Under the CEC's proposals, graphic and artistic expression via signage would be severely limited to lighted letters and symbols only, with all backgrounds or supporting materials being constructed of opaque materials. Moreover, the additional costs and technological limitations imposed by this recommendation, which again was not researched or reported in the consultant's proposals, may drive the costs of such signage beyond the resources available to many potential speakers and make this mode of expression more difficult for many speakers to obtain. In essence, the CEC's proposals would be establishing a statewide "look" of lighted outdoor signage without any regard for the intended communication needs, desires, or budgets, of the sign-users, and again doing so without any proof that this requirement is either connected to, or would actually result in, energy conservation. The Supreme Court has taken a dim view of government regulations

attempting to prohibit verbal and nonverbal expression, and has stated that the government may not permit designated symbols to be used to communicate a limited set of messages. *Texas v. Johnson*, 491 U.S. 397 (1989).

**First Amendment protection of commercial speech.**

The Supreme Court has recognized that so-called "commercial speech" is entitled to protection under the First Amendment and that the public has a protected interest in the free flow of truthful information, even if that information is provided with a profit motivation of the speaker. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). The Court has established an intermediate level of scrutiny for content-based regulations of commercial speech, employing a four-pronged balancing test established in *Central Hudson Gas & Electric Corp., v. Public Service Commission*, 447 U.S. 557 (1980).

In *Central Hudson*, a New York statute that prohibited public utility advertising was challenged by the utility. The State's asserted interest was in the conservation of energy and their defense of the statute claimed that advertising by a utility would increase consumer demand and lead to increased energy consumption, in direct contravention of their stated interest. In reaching their decision, the Court employed a four-prong approach, similar to the analysis for time, place and manner regulations of speech. They determined that for commercial speech to come within First Amendment protection: (1) the speech must concern lawful activity and not be misleading; (2) the asserted government interest to be served by the regulation must be substantial; (3) where these first two conditions are met, the regulation must directly advance the government interest asserted; and (4) the regulation must not reach further than is necessary to serve that interest. *Central Hudson*, Id. The Court then struck down the New York statute because it failed the fourth prong of the test in that the State could achieve its goal of energy conservation by a less restrictive means, such as by requiring that energy conservation information be included with the advertisements for the utility. Id.

Applying the standards set forth in *Central Hudson* and its lineage of cases, it is clear at the outset that the proposals put forward by the CEC's consultant's for outdoor lighting regulation of signs is fatally flawed. Despite the State's legitimate interest in energy conservation, the proposals of Eley Associates' utterly fails to make any attempt to meet the third or fourth prongs of the *Central Hudson* test for regulating commercial speech.

*Central Hudson's* third prong requires that the regulation impacting commercial speech must directly advance the government interest asserted. *Central Hudson Gas & Electric Corp., v. Public Service Commission*, 447 U.S. 557 (1980). As stated previously, Eley Associates' and the CEC have not produced any evidence, data, or credible research to support their conclusion that regulations designed to prevent "light trespass" or "light pollution" will actually result in energy conservation or a reduction in peak energy

demand. In fact, there has not been any evidence, data, or credible research produced to support the idea that "light trespass" and "light pollution" are factors that cause increased energy use or that these "issues" command attention as significant sources of wasted energy. Further, and as pertaining to on-premise signs in particular, there has been no evidence, data, or credible research to indicate that lighted on-premise signs are a significant contributor to energy waste or to demonstrate that the proposed regulations affecting on-premise signs would actually result in an overall energy savings to the public. With a regulation so completely devoid of evidence to support the government's asserted interest, it is extremely unlikely that the CEC proposals can withstand the third-prong of the Hudson test. See *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981).

The fourth prong of the Hudson test, requiring that the regulation of commercial speech must not be more extensive than is necessary to serve government's interest, has been equally ignored in the CEC/Eley Associates proposals. The proposals for the creation of statewide "lighting zones" regulating the maximum illumination levels of signs according to their location within these zones – again, without any credible research, data, or evidence to support the rationale for these districts, or to demonstrate the potential impact on the readability or conspicuity of the affected signs – puts forward a scheme of invidious discrimination against all commercial sign users who are not geographically located within a zone that allows sufficient lighting to communicate their messages at night. Eley Associates only criteria for diminishing the illumination among the various "lighting zones" was to reduce the manufacturers recommendations, used in Lighting Zone 1, to the "75$^{th}$ percentile of the range of lighting" for LZ3, then set LZ2 at 50% of LZ3 lighting levels, and limit signs in Lighting Zone 1 to 20 Watts per sign face. This "research" was obtained on a limited number of signs from a very limited number of sign manufacturers' websites, and most importantly, the suggested approach pays absolutely no attention to the communicative aspect of signs or the actual illumination needs for various signs to be read at night. (Furthermore, such illumination proposals are technically flawed and may actually result in an increase in energy consumption, contrary to the State's objective to conserve energy.)

Additionally, the CEC's proposal to restrict internally illuminated signage displays to those with reverse-contrasting letters and graphics is far more extensive than necessary to promote energy conservation. Without investigating or disclosing the potential for dramatic increases in the costs to sign manufacturers and to sign users, the CEC's consultants have recommended regulation requiring specific manufacturing procedures that will likely increase the costs of signage as an advertising medium, and thereby foreclose the opportunity to engage in this form of commercial speech to many potential speakers (such as the small independent merchant). Moreover, the design limitations offered by the CEC proposals will limit the abilities of sign users to utilize graphics, logos and artistic expression in the design of their signs, again substantially abridging speech in a manner that is unnecessary to serve the interests of energy conservation.

Whether through implementation of the proposed "lighting zones" or through statewide regulation of the type and style of advertising displays allowed, the CEC's

proposals will substantially burden the First Amendment rights of sign users across the State. The CEC's proposals are clearly more extensive than necessary to serve the State's interest in energy conservation.

**CONCLUSION**

In conclusion, we believe the CEC proposal is fatally flawed. On-premise signs simply cannot and should not be regulated in this fashion. The CEC effort if pursued will result in unlawful imposition of zoning controls and engender litigation. Again, we remain committed to pursuing energy conservation and welcome the opportunity to participate with the CEC in that regard.

Sincerely,

Robert M. Aran

ROBERT M. ARAN, Esq.
General Counsel

CC: Mark Gastineau, Gov. Affairs Chairman
Peggy Thomas, Exec. Director
Jeff Aran, Gov. Affairs Director
Steve Kieffer, ISA President
Jim Cassie, COAAA
Wesley Miller, Signtronix
Jim Abrams, Calif. Hotel Assn.
Assemblyman Brian Sher
Brian Maas, Calif. Motor Car Dealers Assn